



HENRY McMASTER  
ATTORNEY GENERAL

November 4, 2010

The Honorable Chip Huggins  
SC House of Representatives, Dist. No. 85  
308 Wayworth Court  
Columbia, SC 29212

Dear Representative Huggins:

We received your letter requesting an opinion of this Office concerning the South Carolina Board of Paroles and Pardons voting procedures. You asked our Office to advise “what the correct procedures are for the board to re-vote on a case which has already been decided by a previous vote.”

To better illustrate your question, you provided a hypothetical situation:

“The board voted to reject a parole request for an offender incarcerated for murder with four board members in favor and two members voting not to parole (the board procedures require violent offenders to receive five votes in order to be paroled. The board is composed of seven members, but there were only six board members present.) After the decision was made and the hearing was closed on this case, one of the board members voting not to parole the offender requested the case be reconsidered. The board member making the request stated the reason was he wanted to change his vote, there was no new evidence. A motion was made to reconsider the case and it passed 5 to 1. The board then voted to parole the offender with a 5 to 1 vote.” In this case, neither the victims nor the offender was notified that the case was being reconsidered.

This Office will address prior opinions, relevant statutes, caselaw and the SC Board of Paroles and Pardons’ Operations Manual to determine the proper way to conduct a re-vote.

### **Law/Analysis**

The South Carolina Department of Probation, Parole and Pardon Services was created by S.C. Code § 24-21-10. The Department includes the Board of Paroles and Pardons, as explained in S.C. Code § 24-21-10(B). The enabling statute reads in relevant part as follows:

- (A) The Department of Probation, Parole, and Pardon Services, hereafter referred to as the "department", is governed by the director of the department. The director must be appointed by the Governor with the advice and consent of the Senate.
- (B) The Board of Probation, Parole, and Pardon Services is composed of seven members. The terms of office of the members are for six years. Six of the seven members must be appointed from each of the congressional districts and one member must be appointed at large.

S.C. Code § 24-21-10.

S.C. Code § 24-21-13 explains that the board is governed under written policies and procedures, as developed by the board's director:

- (A) It is the duty of the director to oversee, manage, and control the department. The **director shall develop written policies and procedures** for the following:
  - (1) the supervising of offenders on probation, parole, community supervision, and other offenders released from incarceration prior to the expiration of their sentence;
  - (2) **the consideration of paroles and pardons** and the supervision of offenders in the community supervision program, and other offenders released from incarceration prior to the expiration of their sentence. The requirements for an offender's participation in the community supervision program and an offender's progress toward completing the program are to be decided administratively by the Department of Probation, Parole, and Pardon Services. No inmate or future inmate shall have a "liberty interest" or an "expectancy of release" while in a community supervision program administered by the department;
  - (3) the operation of community-based correctional programs; and
  - (4) the operation of public work sentence programs for offenders as provided in item (1) of this subsection. This program also may be utilized as an alternative to technical revocations. The director shall establish priority programs for litter control along state and county highways. This must be included in the "public service work" program.
- (B) It is the **duty of the board to consider cases for parole, pardon**, and any other form of clemency provided for under law.

S.C. Code § 24-21-13 (emphasis added).

In an opinion of this Office dated February 15, 1978, we explained that departments may act within their authority and create necessary rules:

Administrative bodies have the authority to make or adopt rules and regulations with respect to matters which are within the province of the body. The provisions of the statute control as to what areas rules and regulations deal with. The rules and regulations can properly function to effectuate the purpose of legislation.

Op. S.C. Atty. Gen., February 15, 1978 (citing 91 C.J.S. Public Administrative Bodies and Procedures, § 112).

#### Parole Hearing Procedures

The Department has an Operations Manual for the SC Board of Paroles and Pardons. According to the written procedures, the board's hearing is conducted as follows:

Parole hearings are informal proceedings, and the Board or its panels may properly conduct them with a fairly free hand. What follows here is a model plan for conducting hearings. In the experience of both the Board and the Department, this model has worked well. It is only a model, and the Board or its panels are free to deviate from it.

- The Department, through its Parole Board Support Services schedules hearings. The names and case numbers of offenders who have been scheduled for a parole hearing are then published at the respective prisons where they are confined, so that they can begin preparing themselves for their hearing.
- The Department, through its parole examiners, then interviews these offenders, investigates their cases, and submits a recommendation for or against parole.
- At the hearing, the offender or offender's counsel, if the offender has counsel, appears first and presents case to the Board or panel. If the offender has family members or other persons appearing, they may be allowed to make a statement. The Board or the panel may limit the number of witnesses to three; more witnesses may be allowed if the circumstances warrant it.
- Members of the Board or the panel may ask questions of the offender and his witnesses. The Board's Chair or the member presiding over the panel leads the questioning.
- Once the case has been presented, the offender is excused from the hearing room, and those appearing in opposition to parole are then given their opportunity to be heard.
- After the witnesses in opposition are heard, they are excused from the hearing room, and the Board or the panel then deliberates over the case.
- **After deliberations, a voice and electronic vote is cast.**
- The offender and the other interested parties are then informed of the decision by Department staff. If the offender is rejected for parole, the Department gives a written notice of the reasons for rejection.
- The hearings proceed in this manner until all cases scheduled to be heard have been heard.

South Carolina Jurisprudence summarizes the procedure of the board's parole hearings as follows:

At the parole hearing the prisoner himself has the right to appear and present evidence in his own behalf; but if he fails to appear, the Board has the right to decide the case in his absence. He may, if the Board allows it, have up to three witnesses, of his own choosing, appear in his behalf. In addition, the prisoner may at his own expense have an attorney represent him at his hearing. Under the Victim's and Witness's Bill of Rights, victims and their families and prosecution witnesses also have the right to appear at parole hearings if they wish to be heard on the question of a prisoner's release. **After the hearing itself has concluded and all the people, both for and against parole, have been heard, the Board votes to grant or deny parole.** If the Board decides to deny parole, the prisoner is given written notice of the Board's reasons for rejecting him. If the Board decides to grant parole, the prisoner will be released from the custody of the Department of Corrections into the custody of the parole authorities, under certain standards, and often under certain special conditions of supervision.

26 S.C. Jur. Probation, Parole, & Pardon § 18 (emphasis added).

Because of the offender's right to appear, certain notice requirements are set in place. The Director of Parole Board Support Services is responsible for giving adequate and timely notice of hearings at least 30 days before the date of the hearing to the offender. Additionally, the Director of Victims Services is responsible for giving adequate and timely notice of hearings at least 30 days before the date of the hearing to the victim or, if deceased, the victim's immediate family; the solicitor in jurisdiction where offender was prosecuted; law enforcement agency that made arrest; and the judge of court in which offender was convicted and sentenced. See, SC Board of Pardons and Paroles, Operations Manual, Part II, Notice Requirements, p. 20. See also, 26 S.C. Jur. Probation, Parole, & Pardon § 18.

South Carolina law gives the Board sole and exclusive power to grant or deny paroles; however, this power is not unlimited. In making its parole decisions, "the Board is required by law to carefully consider the record of the prisoner before, during and after imprisonment." SC Board of Pardons and Paroles, Operations Manual, Part II, Absolute Discretion of the Board, p. 28.

#### Rehearing Requirements

The full Board or one of its panels may consider re-hearing in a case if one or more of the following reasons apply:

- a. Subsequent Misconduct by the Prisoner. In those cases where the Board has granted parole conditioned on the satisfaction of some pre-release requirement, and the prisoner has committed some violation of prison rules before the actual release from prison, the case will be presented to the Board or panel in order to deal with the subsequent misconduct.

- b. New Criminal Charges Against the Prisoner. This is similar to the situation just described above - subsequent misconduct by the prisoner; only the misconduct here is more serious than the violation of a prison disciplinary rule. Here, the misconduct rises to the level of being a violation of the criminal law.
- c. After-Acquired Information About the Prisoner. In this situation, the Board or panel may have acquired some new material and information after it has made its final decision. The information about the prisoner's case appears, in the Board's or panel's judgment, to be so important as to require an immediate reconsideration of the case. In that event, the case will be presented to the Board or panel to review its decision in light of the new information.
- d. Failure of the Prisoner to Meet Conditions of Release. Finally, in the case where the Board has granted parole or provisional parole conditioned on the satisfaction of some requirement, and the prisoner has failed to satisfy that requirement, the Board or panel might want to review the matter in order to look into the facts and circumstances surrounding the prisoner's failure to do what was required.
- e. Requested by the inmate or the inmate's attorney. In these cases, the inmate or the inmate's attorney must submit in writing, within 30 days of the notice of rejection letter, a letter stating why he/she feels that the Parole Board should re-hear this case. The Parole Board will review this information and decide whether or not to grant a re-hearing. A letter will be sent to the inmate or the inmate's attorney notifying them of the Board's decision.

SC Board of Pardons and Paroles, Operations Manual, Part III, Re-hearings of Parole Cases, p. 44.

American Jurisprudence explains that the parole board has inherent power to reconsider a case if there is newly discovered evidence:

The paroling authority has inherent power to reconsider its grant of parole to a prisoner, and to rescind the grant for cause. Thus, a parole board acts properly in rescinding its vote on a parole where, after having initially voted to release the parolee, the **parole board discovered that it had failed to avail the victims of the parolee's crime of their statutory right to address the parole board prior to its vote**; after reopening the matter to allow such testimony, and after hearing from the parolee and his or her counsel, the board could rescind its earlier vote.

Until a prisoner is actually released, a parole board has the power to reopen and advance, postpone, or deny a parole which has been granted. **Reopening of a parole determination may be made to depend on the existence of "new information," either on behalf of, or in opposition to, the granting of parole, even if the new information was in existence,**

**but was not considered, when the initial parole decision was made. The discovery of an error may be considered "new information" sufficient to justify the reopening of a case.**

Observation: Where a determination is reopened on the basis of new information, the reopened hearing must be conducted in accordance with the procedure for an initial hearing; it is not inappropriate for the parole authority to review previously considered allegations in light of the newly received information, and it may come to a different conclusion as to those allegations based on the new information. . . .

59 Am. Jur. 2d Pardon and Parole § 101.

#### Standard of Review

If the offender is initially granted parole, but the Board subsequently decides to deny parole, there is only a very small window of time in which the Board may do so. American Jurisprudence explains that “[b]efore delivery and acceptance, a pardon may be revoked by the officer or body granting it, but after its delivery and acceptance, a pardon, if not void in its inception, cannot be revoked for any cause, for then it has passed beyond the control of the officer or body granting it, and has become valid and operative act.” 59 Am Jur 2d Pardon and Parole § 42.

In the hypothetical posed above, the Board denied parole initially, and one member of the Board desired to change his vote, granting parole. The Operations Manual explains that “[i]f the offender has not been released on parole, the **process is most often initiated by a report that the Board or panel receives from the parole examiner** at the prison where the offender is incarcerated. However, a report could come from any source. **The report itself would set forth the reasons why the Board or panel should conduct a re-hearing in order to reconsider its original parole decision.** A request for a rehearing may also be made by a petition or letter received from the requesting party within 30 days of the parole rejection. This letter or petition must specify the exact reasons why the Board should reconsider its decision. **The decision to grant or deny a rehearing shall be made in the sole discretion of the Board based upon the letter or petition filed by the requesting party and other documents which are made available to the Board from the parole file.** Notice of the decision will be forwarded to the requesting party.”

Although the Operations Manual states that the report could come from any source, it does not seem logical that the board itself would request the re-hearing but that the parole examiner would request the re-hearing. Regardless, if a rehearing is necessary, the Operations Manual explains that the “purpose of the hearing is to determine the facts and to gather any other material that may bear on the parole decision one way or the other, and based on all those facts, to determine whether or not the grant of parole should be rescinded, amended or stay the same.” In other words, unless additional material is provided, then there would be nothing to evaluate at the rehearing. See, SC Board of Pardons and Paroles, Operations Manual, Part III, Initiating the Process of Rehearing Cases, p. 45-46.

**Conclusion**

It is the opinion of this Office that a court would likely find that the SC Board of Pardons and Paroles may not conduct a re-hearing and re-vote simply because a member of the board desires to change his or her original vote. The board may only conduct a re-hearing if one of the following occur: 1) subsequent misconduct by the prisoner; 2) new criminal charges against the prisoner; 3) after-acquired information about the prisoner; 4) failure of the prisoner to meet conditions of release; 5) requested by the inmate of the inmate's authority. See, SC Board of Pardons and Paroles, Operations Manual, Part III, Re-hearings of Parole Cases, p. 44; 59 Am. Jur. 2d Pardon and Parole § 101.

Finality is important to maintain a healthy legal system. Therefore, public policy restrains the Board from rehearing a case for no reason other than a member of the board wants to change his or her decision.<sup>1</sup>

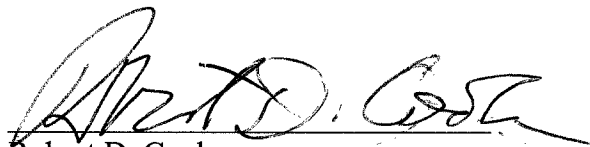
Sincerely,

Henry McMaster  
Attorney General



By: Leigha Blackwell  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General

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<sup>1</sup> If a member of the Board simply needs to correct an error, America Jurisprudence explains that “a parole board has the authority, as an agency performing quasi-judicial functions, to correct a clerical mistake in a parole order which mistakenly reflects the wrong parole release date or release information.” 59 Am. Jur. 2d Pardon and Parole § 102. However, it is unlikely that correcting such an error would cause the Board to call a rehearing nor is there any indication in the hypothetical that the board member wishes to change his vote because of a clerical error.